No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employes Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

PETITION FOR REHEARING.

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Pursuant to Rule 25 of this Court, the appellants respectfully petition for rehearing.

The decision was filed on June 28, 1949, together with the opinion of the Honorable Chief Judge, with the concurrence of Circuit Judge Bone. The grounds for rehearing are [1] that the opinion of the Court shows that the case was inadvertently decided on the basis of the interpretation and application of certain U. S. Code sections not really involved in the case; [2] that the opinion if allowed to stand, will create uncertainty in the law by leaving the impression that the Court regards the exclusionary provisions of U. S. Code, Title 33, Section 903(b) as controlling over the jurisdictional definition contained

in Section 902(2); [3] that the decision, if allowed to stand, will effectually strike from the law and render meaningless the provisions of Section 902(2) requiring that the injury or death arise out of and in the course of employment; and [4] that rules and construction require that the Courts consider the common law in order to find what changes Congress intended to enact in the theretofore governing rules. These four grounds will be argued together, as they relate to the same basic point.

ARGUMENT.

I.

Issue on Appeal Was Interpretation and Application of Section 902(2), 33 U. S. C.

The issue raised by appellants on this appeal is that the uncontroverted evidence and the facts as found by the Deputy Commissioner established that the decedent employee did not suffer "death arising out of and in the course of employment," within the meaning of 33 U. S. Code, Section 902(2), because an employee who violates the employer's specific order as to his work, in order to perform a personal errand or help a fellow-employee's wife, is not doing his job but is engaged in a frolic and detour of his own.

It is respectfully submitted that the Court has seriously erred in looking to Sections 903(b), 904(b) and 920(c) and (d) in construing Section 902(2). It is conceded that the act must be construed as a whole. However, Section 903(b) is obviously an exception to the rule of 902(2). That is, even if an employee is found to be acting within the course of employment, he is barred

under Section 903(b) if his injury is caused by intoxication or wilful self-infliction.

Section 904(b) is merely the standard Workmen's Compensation clause abolishing the negligence test of liability. It was not intended to broaden, narrow or change the law on course and scope of employment.

The presumptions of Section 920 are merely guides to procedure in cases where the employer claims the injury was self-inflicted or caused by drunkenness. These presumptions were not involved in the instant case.

Common Law.

It is respectfully submitted, further, that the common law cannot be disregarded in this case. The Congress used the phrase "course of employment." When so used without new definition, it is conclusively presumed that it was used to adopt the rules under the state statutes from which it had been copied. If there is no such guide to its meaning, then the statute would be void for uncertainty.

The *Cardillo v. Liberty Mut. Ins. Co.* case, 330 U. S. 469, which was quoted by the Court's opinion, was not a case on "frolic and detour." It was a case on whether an employee is in the course of employment while en route to work from the District of Columbia to Quantico, Virginia, where his employer required him to travel and paid him for the time. Many "common law" cases could be cited in support of the result of the case. No doubt Mr. Justice Murphy had in mind the fact that there was a conflict of authority in the several states on the application of the "course of employment" rule to such facts, and

the opinion of the Supreme Court turned toward the liberal view. The Supreme Court's opinion, it is submitted, did not purport to overrule the long-standing canon of construction that requires a Court to inquire, What was the law before this statute? What evil caused the statute? What change did Congress intend to enact?

Heydon's case (1584), 3 Coke 7a, 14 Eng. Rul. Cas. 816;

Denn v. Reid (1836), 10 Pet. 524, 9 L. Ed. 519;

U. S. v. Matthews (1899), 173 U. S. 381, 19 S. Ct. 413, 43 L. Ed. 738;

Holy Trinity Church v. U. S. (1892), 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (Spirit controls over letter of statute);

Smith v. Townsend (1893), 148 U. S. 490, 494, 13 S. Ct. 634, 37 L. Ed. 533, 534 (quoting *Heydon's* case);

Stewart v. Kahn (1871), 11 Wall. 493, 20 L. Ed. 176;

Bruce v. Ailesburg (H. L. 1892) [1892] A. C. 356, 62 L. T. N. S. 490, 14 Eng. Rul. Cas. 822.

It is respectfully submitted that there is no conflict of authority on this point, save and except that created by the instant case which introduces a novel and revolutionary extension of the meaning of the phrase "course of employment." Careful analysis of all precedents will show that a violation of orders may not take one beyond the scope of employment, but only where (1) the act being done was an act the employer required of the employee (who was merely violating the prescribed method), or (2) the order was a standing order (like "No Smoking"), which was customarily disregarded and unenforced.

There is no prior case of deliberate departure from the job the employee was supposed to be doing, to engage in a special act of service to a third party, in violation of specific orders just given, where a Court has held the act to be within the "course of employment."

It is submitted that the state and federal cases cited must be considered by this Court, for a proper application of the Act of Congress. The Act cannot be construed by mere reference to certain listed exceptions to liability, exceptions which were not involved and which are never involved unless and until the employee first proves that he was injured in the "course of employment."

Suppose an employee was injured while drunk, but while driving the employer's delivery truck on an authorized route at regular hours. No one could claim "frolic and detour." Course of employment would be undisputed. Liability could be excluded, however, if the employer could sustain the statutory burden of proof and if the Commissioner found that "the injury was occasioned solely by the intoxication of the employee," as provided in Section 903(b). But, suppose the employer saw the employee had been drinking but was not drunk and ordered him not to drive the truck, but the driver used it anyway to go to the drug store for a pack of cigarettes for personal use. Assume further that the drug store was adjoining the employer's premises and that the truck was involved in an accident solely due to a third party's negligence. There would be no question of the employee being intoxicated or of his condition being the *sole cause* of injury. Yet, he would not be in the course of employment under any fair and reasonable view of the standard phraseology of Workmen's Compensation legislation.

It is essential to a proper understanding and application of the Act, that the Court's opinion make clear that Section 902(2) is the basic test on the scope of liability, and that Sections 903 and 904 are specific exclusions, covering situations where "course of employment" is involved but liability is barred for other reasons.

A rehearing is necessary in this case to correct the opinion on file, and to reconsider the meaning of Section 902(2) within the applicable rules of statutory interpretation.

Conclusion.

A rehearing should be granted.

Respectfully submitted,

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PATRICK H. FORD,
Attorneys for Appellants.

Certificate.

Pursuant to Rule 25 of this Court, appellant's counsel certify that in their judgment this petition is well founded and that it is not interposed for delay. Appellants are making and have made all current payments required by respondents and granting of rehearing will not stay execution of the award.

PATRICK H. FORD.
Of Counsel.